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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF APPLICATION OF)	IPC-E-13-22
IDAHO POWER COMPANY TO UPDATE ITS)	
WIND INTEGRATION RATES AND)	MOTION TO DISMISS
CHARGES.)	

I. INTRODUCTION

Pursuant to Idaho Public Utilities Commission ("IPUC" or "Commission") Rules of Procedure ("RP") 56 and 256, and Idaho R. Civ. Pro. 12(c), Cold Springs Windfarm, LLC, Desert Meadow Windfarm, LLC, Hammett Hill Windfarm, LLC, Mainline Windfarm, LLC, Ryegrass Windfarm, LLC, Two Ponds Windfarm, LLC, Cassia Wind Farm LLC, Hot Springs

Windfarm, LLC, Bennett Creek Windfarm, LLC, Cassia Gulch Wind Park LLC, Tuana Springs Energy, LLC, and High Mesa Energy, LLC (collectively “Movants”) hereby move the Commission to dismiss Idaho Power Company’s (“Idaho Power” or the “Company”) Application. Idaho Power’s Application recommends that the Commission modify the rates and terms in existing contractual legally enforceable obligations of qualifying facilities (“QFs”) without the consent of the QFs. However, the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and implementing regulations of the Federal Energy Regulatory Commission (“FERC”) preempt such unilateral modification of existing contractual legally enforceable obligations. Indeed, federal law preempts the entire administrative process of entertaining Idaho Power’s Application because the process itself subjects Movants to a preempted burden.

Therefore, the Commission should dismiss Idaho Power’s Application in its entirety and allow the Company to re-file an Application that does not recommend applying a new wind integration charge to existing contractual legally enforceable obligations. Alternatively, at the bare minimum, the Commission should dismiss and strike from the record the portions of Idaho Power’s Application and testimony that recommend that the Commission alter the rates and terms in existing contractual legally enforceable obligations. Finally, the Commission should instruct Idaho Power that efforts to unilaterally modify existing contractual relationships with QFs are preempted and inconsistent with this Commission’s orders, and will not be entertained in this docket or any future dockets.

II. BACKGROUND

A. Movants’ QF Projects

Movants’ QF projects can be grouped into two different classes based upon upstream

ownership. Cassia Wind Farm LLC, Hot Springs Windfarm, LLC, Bennett Creek Windfarm, LLC, Cassia Gulch Wind Park LLC, Tuana Springs Energy, LLC, and High Mesa Energy, LLC, are each a wholly owned subsidiary of Continental Wind, LLC which is an indirect wholly owned subsidiary of Exelon Wind, LLC. Cold Springs Windfarm, LLC, Desert Meadow Windfarm, LLC, Hammett Hill Windfarm, LLC, Mainline Windfarm, LLC, Ryegrass Windfarm, LLC, and Two Ponds Windfarm, LLC (collectively the “Mountain Air Projects QFs”) are each a wholly owned subsidiary of Mountain Air Projects, LLC.

Each of Movants’ projects is a self-certified QF that utilizes wind as the renewable fuel source. *See* 18 C.F.R. § 292.201 *et seq.* As explained below, each elected to exercise its right, under 18 C.F.R. § 292.304(d)(2)(ii), to execute and obligate itself to a Firm Energy Sales Agreement (“FESA”) with Idaho Power containing fixed avoided cost rates for the duration of a 20-year contract term. *See Affidavit of Gregory M. Adams* (containing the FESAs of Cassia Wind Farm LLC, Hot Springs Windfarm, LLC, Bennett Creek Windfarm, LLC, Cassia Gulch Wind Park LLC, Tuana Springs Energy, LLC, and High Mesa Energy, LLC); *Affidavit of Peter J. Richardson* (containing each of the Mountain Air Projects QF FESAs).¹

Cassia Wind Farm, LLC owns and operates a wind generation facility with a maximum nameplate capacity of 10.5 megawatts (“MW”), and sells its entire net output to Idaho Power under a 20-year FESA approved by the Commission on June 30, 2006. *See* IPUC Order No. 30086. Among the negotiated terms and conditions of the agreement, Cassia Wind Farm, LLC’s FESA contains the Commission-approved 90%/110% band provision intended to improve performance of the QF. Cassia Wind Farm, LLC also agreed to certain curtailment provisions

¹ The fixed rates are set forth in Article VII or an exhibit to each FESA.

(referred to as “Cassia redispatch”) in a separate Commission-approved agreement with Idaho Power related to transmission upgrades. *See* IPUC Order No. 30414.

Hot Springs Windfarm, LLC and Bennett Creek Windfarm, LLC each own and operate a wind generation facility with a maximum nameplate capacity of 21 MW. They sell their entire net output to Idaho Power under two separate, 20-year FESAs, each of which was executed on December 20, 2006, amended July 2, 2007, and approved by the Commission on February 20, 2007, and August 8, 2007, respectively. *See* IPUC Order Nos. 30245, 30246, 30398, 30399. Among the negotiated terms and conditions of the FESAs, the Hot Springs Windfarm, LLC and Bennett Creek Windfarm, LLC FESAs each contain the Commission-approved 90%/110% band provision intended to improve the performance of the QF.

Cassia Gulch Wind Park LLC owns and operates a wind generation facility with maximum nameplate capacity of 18.9 MW, and Tuana Springs Energy, LLC owns and operates a wind generation facility with maximum nameplate capacity of 16.8 MW. These two projects sell their entire net output of the combined nameplate capacity of 35.7 MW to Idaho Power under a single, 20-year FESA approved by the Commission on October 5, 2009. *See* IPUC Order No. 30917.² This FESA contains negotiated rates generated, in part, from Idaho Power’s AURORA economic dispatch model, consistent with the Commission’s then-effective policy for projects that generate more than 10 MW on an average monthly basis. The purchase price established by running the AURORA economic dispatch model was then blended with the prices contained within the pre-existing Cassia Gulch Wind Park FESA in order to preserve the value of the existing Cassia Gulch Wind Park FESA for Idaho Power’s ratepayers. *Id.* at 1-2. The

² Previously, Cassia Gulch Wind Park LLC sold its entire net output pursuant to a FESA executed in 2006, but that FESA was terminated once Tuana Springs Energy, LLC achieved online status.

negotiated rates also incorporate the wind integration charge in effect at the time of the Operation Date, reducing the fixed avoided cost rates in the FESA. *See id.*

High Mesa Energy, LLC owns and operates a wind generation facility with maximum nameplate capacity of 40 MW, and sells its entire net output to Idaho Power under a 20-year FESA approved by the Commission on February 17, 2012. *See* IPUC Order No. 32462. The High Mesa Energy, LLC FESA contains fixed rates generated in Idaho Power's AURORA economic dispatch model and contains the wind integration charge in effect at the time of the Operation Date, reducing the fixed avoided cost rates in the FESA. *See id.*

Cold Springs Windfarm, LLC, Desert Meadow Windfarm, LLC, Hammett Hill Windfarm, LLC, Mainline Windfarm, LLC, Ryegrass Windfarm, LLC, and Two Ponds Windfarm, LLC (the "Mountain Air Projects QFs") each owns and operates a wind generation facility with maximum nameplate capacity of 23 MW. The Mountain Air Projects QFs sell their entire net output to Idaho Power under six separate 20-year FESAs approved by the Commission through orders issued on December 23, 2010. *See* IPUC Order Nos. 32144, 32145, 32146, 32147, 32148, and 32149. All six of the Mountain Air Projects QFs' FESAs are identical except for the names and locations of the projects. Among the rates and terms in the FESAs, each of the Mountain Air Projects QFs' FESAs incorporates the wind integration charge in effect at the time of the Operation Date, reducing the fixed avoided cost rates in the FESA. *See id.* The Mountain Air Projects' FESAs also incorporate the Commission approved mechanical availability guarantee ("MAG"), which improves the performance of the QFs.

In summary, all of Movants' FESAs incorporate multiple provisions from Commission policies in effect at the time the QFs obligated themselves which are intended mitigate Idaho

Power's concerns with respect to the cost of the intermittency and availability of the QF output. Furthermore, each of the Movants' FESAs expressly provides: "No modification to this Agreement shall be valid unless it is in writing and *signed by both Parties* and subsequently approved by the Commission." (emphasis added).³

2. The Movants' FESAs Each Comport with the IPUC Orders in Effect At the Time of Execution and IPUC Approval.

As evidenced by the Commission's orders approving the Movants' FESAs, each of the FESAs comports with the orders and requirements of the Commission in effect at the time of execution and approval of the FESAs. Some of the FESAs contain the wind integration charge in effect at the time of the applicable Operation Date. The remaining FESAs pre-date implementation of the wind integration charge, but contain other contractual rates and terms, such as the 90%/110% performance band, approved by the Commission to account for estimated value of the energy and capacity supplied by QF generation. However, each of Movants' FESAs contains fixed avoided cost rates based upon the estimated avoided costs to Idaho Power at the time the Movants obligated themselves to sell net output to Idaho Power over a 20-year term. *See* 18 C.F.R. § 292.304(d)(2)(ii).

The fixed rates in Movants' FESAs are entirely consistent with the Commission's orders. Specifically, when the Commission approved the stipulation that implemented the current wind integration charge, the Commission recited the terms of that approved stipulation as follows: "The integration charge *as calculated on Operation Date will remain fixed throughout the term of the contract* and will be applied as a decrement to the applicable published rate" *In the Matter of Idaho Power Company's Petition to Increase the Published Rate Eligibility Cap for*

³ This Modification clause is contained in either Article XXIII or Article XXVI of each of Movants' FESAs.

Wind-Powered Small Power Production Facilities and To Eliminate the 90%/110% Performance band for Wind Powered Small Power Production Facilities, IPUC Case No. IPC-E-07-03, Order No. 30488 at 8 (2008) (hereinafter “IPUC Order No. 30488”) (emphasis added). In approving this framework, the Commission specifically found: “The QF rates we establish for long-term firm contracts are forecast values and estimates and it has long been understood that the avoided-cost concept is not violated by use of such estimates.” *Id.* at 11 (citing 18 C.F.R. § 292.304(b)(5)). The Commission further explained: “We find the use of the adjustment as a decrement to the published avoided-cost rate for wind QFs results in net rates that represent the full avoided cost of wind generation; rates that are fair, just and reasonable.” *Id.* at 12.

Furthermore, the order and stipulation implementing the wind integration charge exempted pre-existing FESAs from wind integration charges, by stating:

QFs currently holding FESAs which include the 90%/110% performance band *can elect to amend their existing FESAs* to replace the 90%/110% performance band with the mechanical availability guarantee but *if they make that election, they will be subject to the wind integration charge* and wind forecasting charge in effect when their Wind QF project achieves its Operation Date.

Id. at 8 (emphasis added). In approving this provision of the stipulation, the Commission specifically ordered: “Amendments must be *signed by the QF* and utility and submitted for Commission review and approval.” *Id.* at 17 (emphasis added).

B. Idaho Power’s Application to Adjust Wind Integration Charges

Idaho Power’s Application requests authorization to update Idaho Power’s wind integration rates and charges consistent with its 2013 Wind Integration Study (“2013 Study”). *See Application* at 1. In supporting testimony, Idaho Power complains that “most of the current wind generators are not even paying the full cap of \$6.50/MWh.” Youngblood, DI at 14. The

Application's over-arching request is that the Commission "decouple the wind integration charge from the avoided cost rate contained in the power sales agreement and instead have wind integration costs assessed as a stand-alone tariff charge." *Application* at 5-6. The Application proposes three methods to implement changes. *Id.* at 6-8. The Application appears to imply that Method 1 and Method 2 could affect QFs with existing FESAs, or at least fails to assert that Method 1 and 2 will not affect existing projects. However, Idaho Power's proposed Method 3 expressly requests that the Commission modify the rates and terms of Movants' existing contractual legally enforceable obligations. *Id.* at 7-8.

Specifically, under Method 3, Idaho Power requests approval of its proposed Tariff Schedule 87 that would apply the results of the 2013 Study to all existing wind QF FESAs to increase the wind integration charge and thus decrease the fixed avoided cost rates paid to those QFs. *See id.* at 7-8; Youngblood, DI at Ex. No. 4. Thus, under Method 3, Idaho Power expressly asks the Commission to amend existing contractual legally enforceable obligations. Although Idaho Power recommends amending existing FESAs, the Application does not state that Idaho Power contacted *any* of its QF counter parties to seek their consent to amend their contractual legally enforceable obligations – thus making Idaho Power's proposal entirely unilateral.

III. ARGUMENT

A. Legal Standard for the Commission's Review

Under Idaho R. Civ. Pro. 12(c), "where the record reveals no issues of disputed fact, the question is one of law." *Trimble v. Engelking*, 130 Idaho 300, 302, 939 P.2d 1379, 1381 (1997); *see also Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 988-92 (9th Cir. 2011) (affirming

dismissal under Fed. R. Civ. Pro. 12(c) on preemption grounds). In ruling on motions to dismiss, a court considers “the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), *cited as consistent with Idaho law in Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010).⁴

B. Federal Law Preempts Unilateral Modification of Movants’ Contractual Legally Enforceable Obligations.

1. The Supremacy Clause of the U.S. Constitution Invalidates State Laws that Conflict with Federal Statutes or Regulations.

Under the Supremacy Clause, preemption occurs (1) when federal law expressly preempts state law, (2) when “Congress intends federal law to occupy the field,” or (3) when there is “any conflict with a federal statute.” *Crosby v. Natl. For. Trade Council*, 530 U.S. 363, 372 (2000) (internal quotation omitted); U.S. Const., art. VI, cl. 2. Conflict arises when “compliance with both federal and state regulations is a physical impossibility,” or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (internal quotations omitted). Federal law includes federal regulations, which have no less preemptive effect than federal statutes. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). And federal courts “give ‘great weight’ to any reasonable construction of a regulatory statute adopted by the agency charged with its

⁴ Although the court rules do not strictly govern proceedings before the Commission, *see McNeal v. Idaho Pub. Util. Comm’n*, 142 Idaho 685, 690, 132 P.3d 442, 477 (2006), *abrogated on other grounds by Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011), the Commission’s rules also provide for dismissal of an application for lack of authority to issue the requested relief. *See* IDAPA 31.0.01.056; *In re Petition of J.R. Simplot Co. for a Determination of Price Regarding the Purchase and Acquisition of Certain Assets Owned by Idaho Power Co.*, IPUC Case No. IPC-E-13-17, Order No. 32970 (2013).

enforcement.” *Bank of Am. v. City & County of S.F.*, 309 F.3d 551, 563-64 (9th Cir. 2002) (internal quotation omitted).

2. PURPA Preempts Unilateral Modification of Movants’ Fixed-Price FESAs.

a. Section 210(b) of PURPA and Sections 292.304(b)(5) and (d)(2)(ii) of FERC’s regulations preempt modification of the rates in all of Movants’ FESAs.

“Section 210 of PURPA specifies the benefits to which QFs are entitled.” *Ind. Energy Prod. Ass’n, Inc. v. Cal. Pub. Util. Comm’n*, 36 F.3d 848, 850 (9th Cir. 1994). Section 210(b) requires FERC to adopt regulations for the purchase of QF output. *Id.* (citing 16 U.S.C. § 824a-3(b)). FERC exercised this authority to require that utilities purchase electric energy from QFs at the utility’s full avoided cost rate. *Id.* at 851 (citing 18 C.F.R. § 292.304(d)). FERC’s regulations also provide that each QF has the option to sell energy on an “as available” basis or pursuant to a contract or other legally enforceable obligation over a specified term. *Id.* (citing 18 C.F.R. § 292.304(d)(1) & (2)). If electric energy is purchased pursuant to a contractual legally enforceable obligation, the rate for such purchases is based, at the QF’s option, on either the avoided cost as calculated at the time of delivery, or the avoided cost as calculated at the time the obligation is incurred. *Id.* at 851-52 (citing 18 C.F.R. § 292.304(d)(2)(i) & (ii)). “In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.” 18 C.F.R. § 292.304(b)(5).

In promulgating these regulations, FERC explained that Sections 292.304(b)(5) and (d) of its regulations are intended to “provide certainty with regard to return on investment in new

technologies.” *Small Power Production and Cogeneration Facilities; Reg. Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980). “The import of [Section 292.304(b)(5)] is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances.” *Id.* Additionally, in affirming FERC’s full avoided cost rule, the U.S. Supreme Court cited at length from the legislative history of Section 210(b) of PURPA, regarding the rate to be paid to QFs, and concluded: “Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities.” *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 414 (1983) (citing H.R. Conf. Rep. No. 95–1750 at 97-98 (Oct. 10, 1978)).

The Ninth Circuit’s decision in *Ind. Energy Prod. Ass’n, Inc.* is directly on point here. 36 F.3d 848. In that case, the California Public Utilities Commission (“CPUC”) sought to “adjust[] the avoided cost rate to reflect the reduced efficiency of a QF that is not in compliance with operating and efficiency standards.” *Id.* at 857. The Ninth Circuit held, however, that the CPUC’s attempt to “eliminate[] a consumer subsidy” violated the QFs’ federal right, contained in 18 C.F.R. § 292.304(d), to sell at long-term, fixed avoided cost rates. *Id.* at 858.

The *Ind. Energy Prod. Ass’n, Inc.* court explained:

The underlying motivation behind the CPUC program is to lower the rates set in appellees’ standard offer contracts because they are higher than the Utilities’ current avoided costs. As noted above, this differential exists because the standard offer contracts lock the Utilities into paying rates that were calculated on incorrect assumptions about the future cost of fossil fuels, the primary fuel source used by the utility to generate electric energy. However, the fact that the prices for fuel, and therefore the Utilities’ avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed. 18

C.F.R. § 292.304(d)(2).

Id. “While the actual avoided cost might vary over time, under current law the QF remains entitled to receive the avoided cost rate specified in its contract.” *Id*; *see also Wilson v. Harlow*, 860 P.2d 793, 799-800 (Okla. 1993) (holding that 18 C.F.R. 292.304(b)(5) and (d)(2) provide QFs the “right to receive the benefit of the contract even if, due to changed circumstances, the contract price for power at the time of delivery is unfavorable to the utility,” and thus preempted contrary state law); *Smith Cogeneration Mgt. v. Corp. Comm’n*, 863 P.2d 1227, 1240-41 (Okla.1993) (same).

Furthermore, FERC has interpreted PURPA and Sections 292.304(b)(5) and (d)(2) of its own regulations to prohibit re-opening of executed contracts. “If we were to . . . allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered. Such a result is not, in our opinion, consistent with Congress’s directive that we encourage the development of QFs.” *N.Y. State Elec. & Gas Corp.*, 71 FERC ¶ 61,027, at 61,117-18, *reconsid. denied*, 72 FERC ¶ 61,067 (1995), *appeal dismissed sub nom. N.Y. State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473 (D.C. Cir. 1997).

As was the case in the decisions cited above, the Movants here each exercised their federal right, under 18 C.F.R. § 292.304(b)(5) & (d)(2)(ii), to sell to Idaho Power at fixed-price avoided cost rates calculated at the time they incurred a contractual legally enforceable obligation. Consistent with federal law, the Commission approved the wind integration stipulation that provides, “The integration charge *as calculated on Operation Date* will remain fixed throughout the term of the contract and will be applied as a decrement to the applicable

published rate” IPUC Order No. 30488 at 8 (emphasis added). The Commission-approved stipulation further provided wind QFs with FESAs pre-dating the wind integration charge with the option, but not the requirement, to amend their FESAs to remove the 90%/110% performance band and substitute the MAG and the then-effective, fixed wind integration charge. *Id.*

Conflict preemption bars Idaho Power’s Application because unilateral modification of the rates frustrates the purpose of Sections 292.304(b)(5) and (d)(2)(ii) by depriving Movants’ QFs of the right to benefit from the fixed avoided cost rates in their FESAs. Idaho Power cannot side-step the law with its proposal to “de-couple the wind integration rate from the avoided cost rate contained in the power sales agreement.” Youngblood, DI at 12. Under federal law, Movants “are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed.” *Ind. Energy Prod. Ass’n, Inc.*, 36 F.3d at 858. To grant Idaho Power’s proposed modification of the avoided cost rates, would “deny to QFs one of the benefits to which they are statutorily entitled under PURPA” *Id.* at 855. Thus, federal law conflicts with and preempts unilateral amendment of the fixed avoided cost rates contained in Movants’ FESAs, either directly or through application of a stand-alone wind integration tariff.

b. Section 210(e) of PURPA and Section 292.602 of FERC’s regulations independently preempt the entire field of ongoing state regulation over wind QFs sized 30 MW and under.

In addition to Section 210(b) of PURPA and Sections 292.304(b)(5) and (d)(2)(ii) of FERC’s regulations, Section 210(e) of PURPA and Section 292.602 of FERC’s regulations independently preempts the entire field of ongoing state regulation of wind QFs sized 30 MW and under. *See* 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602. This broad exemption displaces the entire field of “state laws and regulations respecting the rates, or respecting the financial or

organizational regulation, of electric utilities.” 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c).

Numerous courts have relied upon Section 210(e) of PURPA to prohibit state commissions from engaging in any form of ongoing utility-type regulation of QF contracts rates or terms. In *Freehold Cogeneration Assoc., L.P. v. Bd. of Reg. Com'rs of State of N.J.*, the Third Circuit held “once the [state utility commission] approved the power purchase agreement between Freehold and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [state commission] to reconsider its approval or to deny the passage of those rates to [utility’s] consumers under purported state authority was preempted by federal law.” 44 F.3d 1178, 1194 (3rd Cir. 1995); accord *In Re Petition of Atlantic City Elec. Co.*, 708 A.2d 775, 778-79 (N.J. Super. 1998); *Or. Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.*, 7 P.3d 594, 605-06 (Or. App. 2000); *West Penn Power Co. v. Penn. Pub. Util. Comm’n*, 659 A.2d 1055, 1066 (Pa. Cmmw. 1995).

The Commission’s orders comport with Movants’ position. See *Grand View PV Solar Two, LLC v. Idaho Power Co.*, IPUC Case No. IPC-E-11-15, Order No. 32580 at 14 (2012). “Once a PPA has been executed and approved by the Commission – once the contract terms are set – they are generally not subject to future change absent the express language of the PPA, or the agreement of the parties.” *Id.* (citing *Rosebud Enter., Inc. v. Idaho Pub. Util. Comm’n*, 128 Idaho 609, 622-23, 917 P.2d 766, 779-80 (1996); *Afton Energy, Inc. v. Idaho Power Co.* (“*Afton I*”), 107 Idaho 781, 786-87, 693 P.2d 427, 432-33 (1984)).

Therefore, in addition to Section 210(b) of PURPA and Sections 292.304(b)(5) and (d)(2) of FERC’s regulations which apply to all of Movants’ FESAs, Section 210(e) of PURPA

preempts the entire field covering Idaho Power's proposal to unilaterally modify the contractual legally enforceable obligations with Movants' wind QFs sized 30 MW and under.

c. Movants have not agreed to revision of their fixed avoided cost rates.

Although not addressed in Idaho Power's Application, Idaho Power may point to a clause it has required to be included in virtually all Idaho PURPA contracts, including Movants' FESAs, as a purported basis to update wind integration costs allocated to Movants. That clause, contained in Article VII of each of Movants' FESAs, provides:

Continuing Jurisdiction of the Commission - This Agreement is a special contract and, as such, the rates, terms and conditions contained in this Agreement will be construed in accordance with Idaho Power Company v. Idaho Public Utilities Commission and Afton Energy, Inc., 107 Idaho 781, 693 P.2d 427 (1984), Idaho Power Company v. Idaho Public Utilities Commission, 107 Idaho 1122, 695 P.2d 1 [sic] 261 (1985), Afton Energy, Inc. v. Idaho Power Company, 111 Idaho 925, 729 P.2d 400 (1986), Section 210 of the Public Utilities Regulatory Policies Act of 1978 and 18 CFR §292.303-308.

Contrary to any arguments Idaho Power may make, this clause expressly incorporates Section 210(b) of PURPA and Sections 292.304(b)(5) and (d)(2) of FERC's regulations, under which Movants "are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed." *Ind. Energy Prod. Ass'n, Inc.*, 36 F.3d at 858. The clause also expressly incorporates Section 210(e) of PURPA, which forbids ongoing utility-type regulation. 16 U.S.C. § 824a-3(e)(1).

The clause's reference to the Idaho Supreme Court's *Afton* decisions also incorporates the federal law restriction against unilateral price modification. *See Afton I*, 107 Idaho at 786-88, 693 P.2d at 432-34 (subjecting contract prices to later modification based on regulatory determination that they are contrary to the public interest results in utility-type regulation, which Congress rejected in enacting PURPA), *on reh'g* 107 Idaho at 793, 693 P.2d at 439 (*hereinafter*

“*Afton II*”) (holding that a PURPA contract, “while not constituting a tariff, is a special type of contract. The Commission should apply the fair, just and reasonable standard, *in a manner not inconsistent with federal law* to the extent that it may be applicable, to determine whether the rates need to be adjusted in this particular type of contract.” (emphasis added)); *accord Idaho Power Co. v. Idaho Pub. Util. Comm’n* (“*Afton III*”), 107 Idaho 1122, 695 P.2d 1261 (1985).

In one recent dispute over a different contract clause, the Commission determined “we generally agree in principle with Grand View that a contract provision that would require future changes in the rates or terms of PPAs would be impermissible under PURPA” *Grand View PV Solar Two, LLC*, IPUC Order No. 32580 at 14. To construe the clause in Movants’ FESAs to allow revision of the rates would require the Commission to conclude that virtually every Idaho Power PURPA FESA contains a clause that is “impermissible under PURPA.” *Id.*

Courts have consistently rejected reliance on contract clauses similar to those in Movants’ FESAs as a basis to “re-open” fixed avoided cost rates. In *Freehold Cogeneration Assoc., L.P.*, the Third Circuit rejected a utility’s attempted reliance on a similar clause because the clause “reflected no intent on the part of Freehold to surrender any of the protection from state rate regulation conferred upon it by Section 210(a)” of PURPA. 44 F.3d at 1193-94. Likewise, in *Oregon Trail Elec. Consumers Co-op, Inc.*, the Oregon appellate court found that the utility “added the price-modification clause in the hope that PURPA would be interpreted to authorize state regulators to modify prices if they were contrary to the public interest.” 7 P.3d at 604. But ultimately, the Oregon court held, “The flaw in this contract is that it sought to use a state regulator, exercising utility-type authority, as the mechanism for modifying the prices set by the contract. PURPA bars that.” *Id.* at 606.

The same is true here. The clause Idaho Power requires to be included in each of its PURPA contracts evidences no intent on the part of Movants to modify the fixed avoided cost rates in Movants' contractual legally enforceable obligations, and provides no basis to do so. Because Idaho Power cannot allege that Movants have consented to the proposed update to the wind integration costs, the Commission must dismiss the Application.

C. Federal Law Preempts Further Administrative Proceedings Related to the Proposal to Unilaterally Modify Existing Contractual Legally Enforceable Obligations.

Prompt dismissal of the Application is necessary because federal law preempts subjecting Movants to the adjudicatory process of litigating the merits of Idaho Power's proposed wind integration costs. Under similar circumstances, the Ninth Circuit explained, "The hardship is the process itself. Process costs money." *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 454 (9th Cir.1993). Litigating the merits of Idaho Power's wind integration study would require highly technical expert witnesses and other costly litigation expenses. The state regulatory process itself is a preempted burden because it would require Movants to spend "a fortune to pay lawyers, economists, accountants" and others to meaningfully protect their interests. *Id.*

Movants have a federal right to "be free of the state administrative proceeding." *Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 412-13 (8th Cir. 1985) (enjoining further administrative proceedings after state utility commission denied motion to dismiss); *accord Pub. Util. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 465, 470 (1943) (enjoining state utility commission proceeding that was only in "embryonic stage" because proceeding conflicted with federal law). This precedent is directly applicable here. Indeed, in *Freehold Cogeneration Assoc., L.P.*, the Third Circuit enjoined a state commission's re-examination of fixed-price PURPA rates well before the process was complete. 44 F.3d at 1189.

In order to ensure that Movants are not subjected to this preempted burden, the Commission should dismiss Idaho Power's entire Application and allow it to be re-filed without recommending modification of existing contractual legally enforceable obligations. Because Idaho Power's unlawful proposal is so interwoven with the rest of its filing, dismissal of the entire Application is warranted. However, in the alternative, the Commission should dismiss and strike from the record the portions of Idaho Power's Application and testimony that recommend that the Commission alter the rates and terms in existing contractual legally enforceable obligations. To assist the Commission, Movants have provided, as Attachment 1 to this Motion, a copy of the Application that demonstrates in strike-out the portions that should be stricken from the record. Additionally, the following portions of the direct testimony should be stricken: Youngblood, DI at p. 8 lns. 8-13, p. 11 lns. 5-9 and 15, p. 12 lns. 8-13 and 19-22, p. 19 ln.4 through p. 23 ln. 10, Ex. Nos. 2, 4; DeVol, DI at p. 22 lns. 1-4. Dismissing the entire Application or, at a minimum, striking the above-referenced material from the record is the only way to relieve Movants of the burden to engage in a preempted process.

D. The Commission Should Admonish Idaho Power Not to File Future Requests to Unilaterally Modify Existing Contractual Legally Enforceable Obligations.

The Application in this case is the latest of repeated proposals that undermine the value of Movants' commitment to supply energy and capacity at fixed rates over the term of their contractual legally enforceable obligations. These efforts are diminishing the value of Movants' substantial investments in Idaho and depriving Movants of the benefit of their bargain.

For instance, Idaho Power also recently proposed to unilaterally revise PURPA agreements to provide itself with a right to economic curtailment under 18 C.F.R. § 292.304(f). But, after that proposal forced many QFs to expend resources to oppose and respond to unilateral

contractual modifications, the Commission found that “curtailment under this section was not reasonably contemplated when the parties entered into their agreements.” *See In the Matter of the Comm’n’s Review of PURPA QF Contract Provisions Including the Surrogate Avoided Resource (SAR) and Integrated Resource Planning (IRP) Methodologies for Calculating Avoided Cost Rates*, IPUC Case No. GNR-E-11-03, Order No. 32697 at 36 (2012). The Commission ultimately instructed Idaho Power: “If the Company believes that the over-supply of QF power presents operational problems during light-load periods then it should address this issue when it negotiates new PPAs.” *Id.* Similarly, at least one of Movants’ FESAs has already suffered economic harm from Idaho Power’s unilateral modification of the market index pricing provisions of the 90%/110% performance band in PURPA FESAs in a manner that has resulted in no payment for a substantial amount of energy delivered to Idaho Power in at least one month.

The burden of responding to these repeated proceedings frustrates the intent of PURPA and this Commission’s prior determination that the rates and integration charges will remain fixed throughout the terms of the Movants’ contractual legally enforceable obligations. Idaho Power’s efforts are not only at odds with the Commission’s prior orders, but they are also in direct contradiction with the requirement in each of the FESAs that no modifications can be made without the consent of the QF. The Commission should reaffirm its commitment to PURPA and the sanctity of contracts by instructing Idaho Power to stop attempting to unilaterally revise fixed price PURPA agreements.

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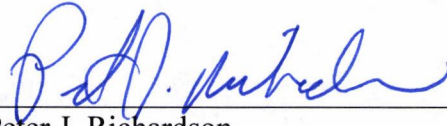
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IV. CONCLUSION

For the reasons set forth herein, Movants respectfully request the following relief:

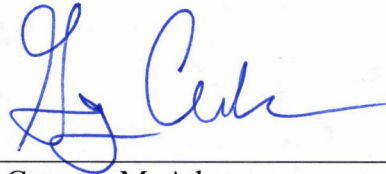
- The Commission should dismiss Idaho Power's Application in its entirety and allow the Company to re-file an Application that does not recommend applying a new wind integration charge to existing contractual legally enforceable obligations.
- Alternatively, at the bare minimum, the Commission should dismiss and strike from the record the portions of Idaho Power's Application and testimony that recommend that the Commission alter the rates and terms in existing contractual legally enforceable obligations. Attachment 1 to this Motion is a copy of the Application that demonstrates in strike-out the portions that should be stricken from the record. Additionally, the following portions of the direct testimony should be stricken: Youngblood, DI at p. 8 lns. 8-13, p. 11 lns. 5-9 and 15, p. 12 lns. 8-13 and 19-22, p. 19 ln.4 through p. 23 ln. 10, Ex, Nos. 2, 4; DeVol, DI at p. 22 lns. 1-4.
- Finally, the Commission should instruct Idaho Power that efforts to unilaterally modify existing contractual relationships with QFs are preempted and inconsistent with this Commission's orders, and will not be entertained in this docket or any future dockets.

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MOTION TO DISMISS

ATTACHMENT 1

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UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)	
OF IDAHO POWER COMPANY TO)	CASE NO. IPC-E-13-22
UPDATE ITS WIND INTEGRATION RATES)	
AND CHARGES.)	APPLICATION
)	

In accordance with RP 052, Idaho Power Company ("Idaho Power" or "Company") hereby respectfully requests the Idaho Public Utilities Commission ("Commission") authorize Idaho Power to update its wind integration rates and charges consistent with its 2013 Wind Integration Study Report ("2013 Study").

In support of this Application, Idaho Power represents as follows:

I. INTRODUCTION

1. Due to the variable and intermittent nature of wind generation, Idaho Power must modify its system operations to successfully integrate wind projects without impacting system reliability. Idaho Power, or any electrical system operator, must provide operating reserves from resources that are capable of increasing or decreasing dispatchable generation on short notice to offset changes in non-dispatchable wind generation. The effect of having to hold operating reserves on dispatchable resources

is that the use of those resources is restricted and they cannot be economically dispatched to their fullest capability. This results in higher power supply costs that are subsequently passed on to customers.

2. Idaho Power, similar to much of the Pacific Northwest, has experienced rapid growth in wind generation over past several years. Idaho Power currently has 577 megawatts ("MW") of wind generation capacity from Public Utility Regulatory Policies Act of 1978 ("PURPA") projects and an additional 101 MW of wind generation capacity from the Elkhorn Valley Wind Farm, for a total of 678 MW of wind generation capacity currently operating on its system. In addition, 505 MW of this wind generation capacity has been added to Idaho Power's system during 2010, 2011, and 2012. This rapid growth has led to the recognition that Idaho Power's finite capability for integrating wind generation is nearing its limit. Even at the current level of wind generation capacity penetration, dispatchable thermal and hydro generators are not always capable of providing the balancing reserves necessary to integrate wind generation. This situation is expected to worsen as wind penetration levels increase, particularly during periods of low customer demand.

3. Idaho Power considers the cost of integrating wind generation in its integrated resource planning when evaluating the costs of utility and third-party generation resources. The costs associated with wind integration are specific and unique for each individual electrical system based on the amount of wind being integrated and the other types of resources that are used to provide the necessary operating reserves. In general terms, the cost of integrating wind generation increases as the amount of nameplate wind generation on the electrical system increases. Failure to calculate and properly allocate wind integration costs to wind generators when calculating avoided cost rates impermissibly pushes those costs onto customers,

making them no longer indifferent to whether the generation was provided by a PURPA Qualifying Facility ("QF") or otherwise generated or acquired by the Company.

II. PRIOR PROCEEDINGS

4. Idaho Power completed its initial wind integration study and published the study report and a subsequent addendum in 2007 ("2007 Study"). The results of the study indicated that at approximately 500 MW of nameplate wind generation, there was an associated integration cost of \$7.92/megawatt-hour ("MWh"). The other Idaho investor-owned utilities, Avista Corporation and Rocky Mountain Power, completed wind integration studies at approximately the same time and each utility filed a petition with the Commission asking to reduce avoided cost rates for wind projects based on the results. Although the Commission did not combine the three utility petitions into a single case, all three were processed simultaneously (Commission Case Nos. IPC-E-07-03, AVU-E-07-02, and PAC-E-07-07).

5. In Case No. IPC-E-07-03, the Commission issued Order No. 30488 in February 2008 approving a joint settlement stipulation and establishing a tiered integration cost structure that increased as nameplate wind generation increased. The stipulation also established a cap of \$6.50/MWh with the understanding that each of the utilities would update their integration studies in the future as more wind generation was added. Order No. 30488 states:

Idaho Power's published avoided-cost rates for Wind QFs will be adjusted to recognize an assumed cost of integrating the energy generated by Wind QFs as a part of the Company's generating resource portfolio. The rate adjustment will be applied in three tiers, increasing as the total amount of wind integrated onto Idaho Power's system grows. The integration charge for each Wind QF project will be calculated at the time a Wind QF project achieves its Operation Date as that term is defined in the Firm Energy Sales Agreement (FESA) between the Company and the

wind QF. The integration charge will be calculated as a percentage (7%, 8% or 9%) of the current 20-year, levelized, avoided-cost rate, subject to a cap of \$6.50/MWh. The integration charge as calculated on the Operation Date will remain fixed throughout the term of the contract and will be applied as a decrement to the applicable published rate according to the table below:

	<u>Amount of Wind Online</u>	<u>Integration Charge</u>
Tier 1	0 to 300 MW	7% (\$6.50/MWh)
Tier 2	301 MW to 500 MW	8% (\$6.50/MWh)
Tier 3	501 MW and above	9% (\$6.50/MWh)

Order No. 30488, quoting Settlement Stipulation which was approved by Commission.

III. 2013 WIND INTEGRATION STUDY REPORT

6. In support of its Application requesting the Commission update Idaho Power's wind integration charge, Idaho Power presents its current Wind Integration Study Report ("2013 Study") as Exhibit No. 1 to the testimony of Philip DeVol ("DeVol Testimony"), filed contemporaneously with this Application. The 2013 Study was also filed with Idaho Power's 2011 Integrated Resource Plan ("IRP") Update on February 14, 2013, in Case No. IPC-E-11-11.

7. As described in Mr. DeVol's Testimony, the 2013 Study analyzed three different levels of wind penetration: 800 MW; 1,000 MW; and 1,200 MW. The 2013 Study, which was completed in February 2013, was conducted using inputs from the 2011 IRP. ~~Results of the analysis showed integration costs of \$8.06/MWh, \$13.06/MWh, and \$19.01/MWh, respectively, if all wind integration costs were spread equally across all wind generation.~~ As described in Mr. DeVol's Testimony, once the 2013 IRP was completed and filed, the 2013 Study was updated with 2013 IRP inputs for the load forecast, Mid-C electric market prices, natural gas price forecast, and the coal price forecast ("Updated 2013 Study"). ~~The results of the Updated 2013 Study are that integration costs went down to \$6.83/MWh, \$10.22/MWh, and \$14.22/MWh,~~

respectively, if all wind integration costs were spread equally across all wind generation. Based upon the very conservative assumption that all of the current 678 MW of wind generation capacity were being assessed the cap of \$6.50/MWh (which they are not) and that they would continue to be assessed just \$6.50/MWh in the future, the incremental costs of wind integration at the three different levels for new wind generators would be \$8.67/MWh at 800 MW, \$24.00/MWh at 1,000 MW, and \$34.70/MWh at 1,200 MW. The Updated 2013 Study results are summarized in the table below from Mr. DeVol's Testimony:

UPDATED 2013 STUDY (using 2013 IRP inputs)

Penetration Level	800 MW	1,000 MW	1,200 MW
Allocated Equally to all Wind (/MWh)	\$6.83	\$10.22	\$14.22
Incremental Cost Allocation (/MWh)	\$8.67	\$24.00	\$34.70

IV. REQUEST TO MODIFY THE WIND INTEGRATION CHARGE

8. The testimony of Michael J. Youngblood, filed contemporaneously with this Application, sets forth the Company's proposals regarding the regulatory treatment to assess and collect the wind integration charges quantified in Mr. DeVol's Testimony. The Company discusses three separate methods from which the Commission could choose to implement to account for wind integration costs in avoided cost rates. Those methods are identified as Method 1: Maintaining Current Allocation; Method 2: Current Allocation with Integration Tariff; and ~~Method 3: Equitable Allocation of Costs~~. The Company proposes two overall changes, which have been incorporated into each of the methods discussed in Mr. Youngblood's testimony, to address the collection of wind integration costs. Change One: abandon the use of percentage of avoided cost rate allocation and instead allocate a fixed amount based upon penetration level; Change

Two: decouple the wind integration charge from the avoided cost rate contained in the power sales agreement and instead have wind integration costs assessed as a stand-alone tariff charge.

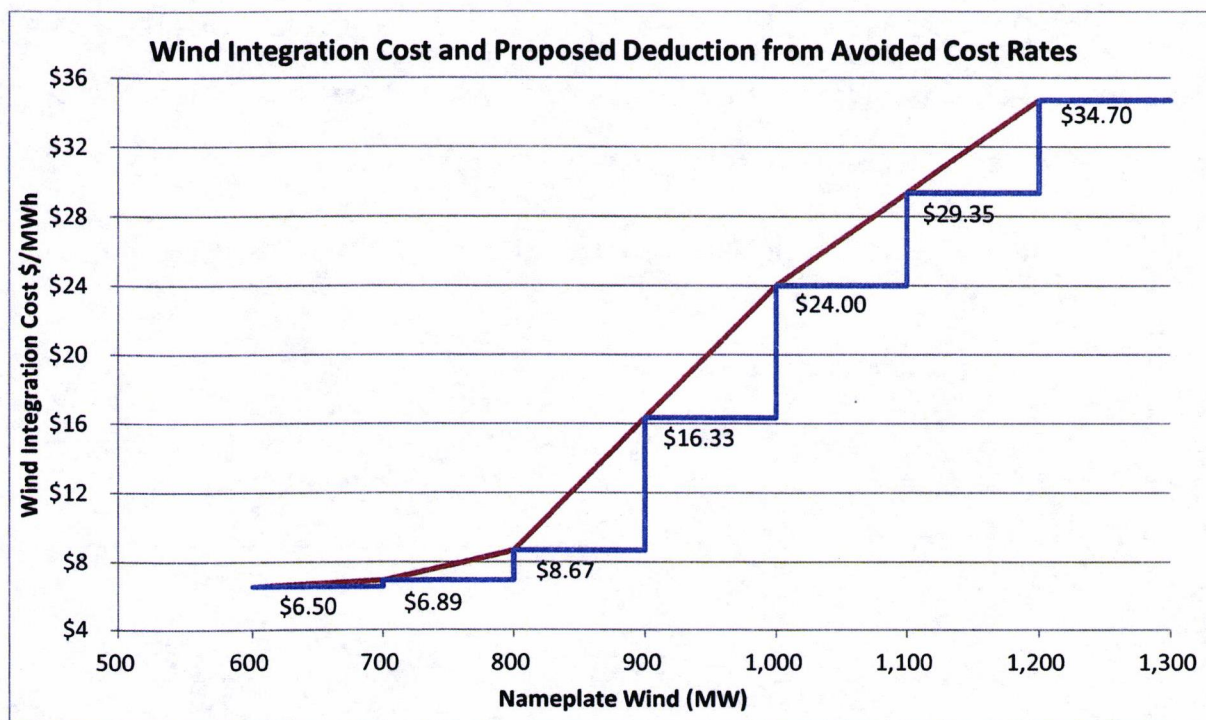
9. The costs associated with wind integration are currently under collected. They are assessed on a percentage basis of various avoided cost rates, which results in an inequitable contribution of the various wind QFs to the cost of integrating wind on the system. The use of the percentage of avoided cost rates really has no relation to actual costs of the additional reserves necessary to integrate variable and intermittent resources on the system. Additionally, setting the amount of wind integration charge for the entire duration of the power sales agreement assures further under collection of integration costs as those costs rise. ~~This under collection from existing wind QFs results in an additional allocation to new wind QFs—the incremental difference—required to make the Company's customers whole, and remain indifferent to the addition of PURPA QF generation that substantially increases the wind integration cost for new wind projects.~~

10. The first method discussed from which the Commission could choose to implement integration charges—Proposed Method 1: Maintaining Current Allocation—does not change the existing structure but updates the rates and penetration levels. As discussed in Mr. Youngblood's testimony, if the Commission were to adopt this method, the three tiers and applicable charges are listed in the table below:

	<u>Amount of Wind Online</u>	<u>Integration Charge</u>
Tier 1	800 MW to 999 MW	\$8.67/MWh
Tier 2	1,000 MW to 1,199 MW	\$24.00/MWh
Tier 3	1,200 MW and above	\$34.70/MWh

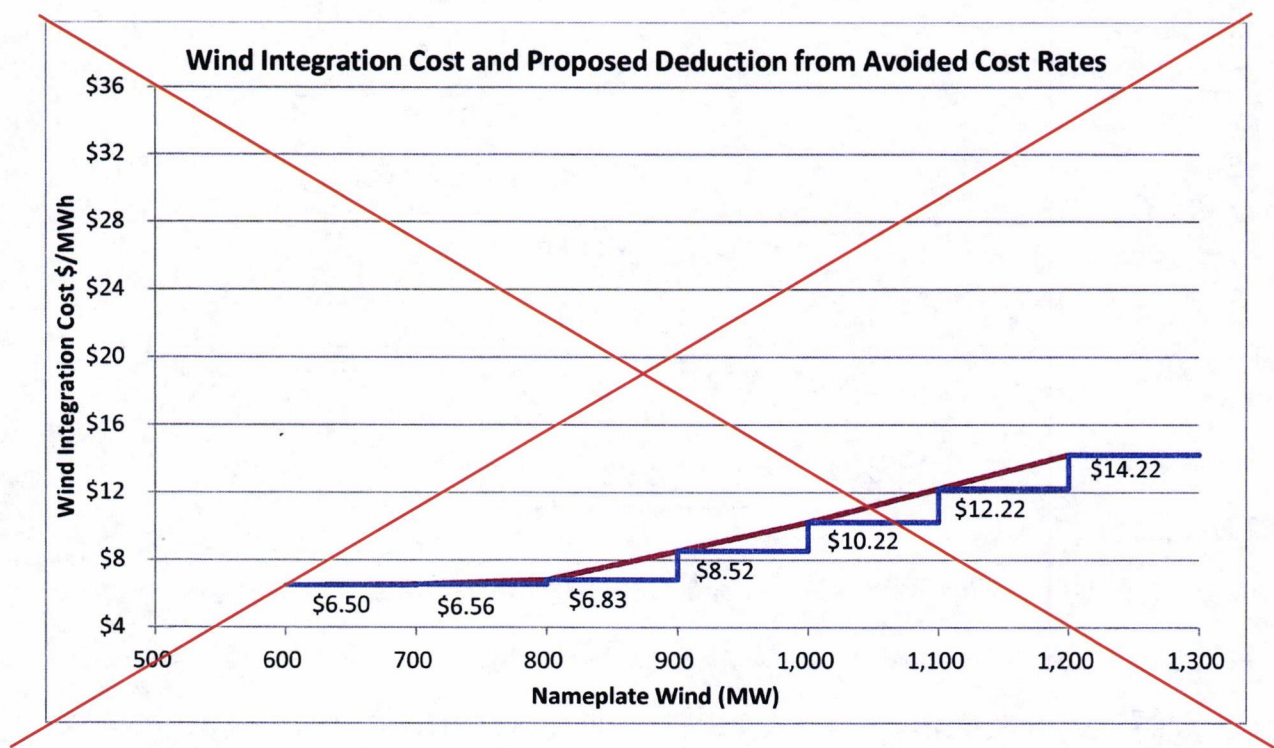
11. The second method discussed to account for integration costs—Proposed Method 2: Current Allocation with Integration Tariff—is a slight modification

to Method 1. For Method 2, rather than embedding the integration charges as part of the avoided cost prices in the contract rates, as is currently done, the Company would implement a new integration charge tariff which would identify the integration charges at the respective levels, separately from the power sales agreement. Exhibit No. 3 to Mr. Youngblood's testimony is a draft Tariff Schedule 87, Variable Generation Integration Charges, depicting the associated charges and penetration levels with Method 2. Under this method, the current deduction of \$6.50/MWh would be used until total nameplate wind generation reached 700 MW. Once 700 MW is reached, the wind integration charge would be increased to \$6.89/MWh. As shown in the graph below, subsequent increases would occur as each incremental 100 MW of wind generation is added.



~~12. The third method the Commission may consider to account for wind integration costs Proposed Method 3: Equitable Allocation of Costs is to spread the integration costs equitably across all PURPA wind generators. In this way, all wind~~

generators would be sharing equitably in the costs of integrating wind onto the Company's system. In addition, this would have the effect of reducing the charge per MWh and, in effect, not penalize new wind generation from coming on line. Exhibit No. 4 to Mr. Youngblood's testimony is a draft Tariff Schedule 87, Variable Generation Integration Charges, depicting the associated charges and penetration levels with Method 3. Under this method all existing wind generation would be classified as "Type I" and all new wind generation would be classified as "Type II" under the draft tariff. Both would start at the current deduction of \$6.50/MWh, but Type I projects, who are already assessed a wind integration charge, would have a net charge of zero. In a similar manner to Method 2, the corresponding wind integration charge escalates with each 100 MW of penetration. Type II projects would pay the full integration charge, where Type 1 projects would pay the net difference between the full charge and the embedded cap of \$6.50/MWh. Type II charges are shown in the graph below. Type 1 charges would be \$6.50 less than that depicted on the graph below.



V. MODIFIED PROCEDURE

13. Idaho Power believes that a technical hearing is not necessary to consider the issues presented herein and respectfully requests that this Application be processed under Modified Procedure; i.e., by written submissions rather than by hearing. RP 201 *et seq.* Idaho Power has contemporaneously filed Direct Testimony of Philip DeVol and Michael J. Youngblood in support of this Application. Should the Commission determine that a technical hearing is required, the Company stands ready to present the testimony at hearing in support of this Application.

VI. COMMUNICATIONS AND SERVICE OF PLEADINGS

14. Communications and service of pleadings with reference to this Application should be sent to the following:

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VII. REQUEST FOR RELIEF

15. As described in greater detail above, Idaho Power respectfully requests that the Commission issue an order approving new rates and charges for wind integration as indicated by the Updated 2013 Study presented herewith.

DATED at Boise, Idaho, this 29th day of November 2013.



DONOVAN E. WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of January, 2014, a true and correct copy of the within and foregoing **MOTION TO DISMISS** was served as shown to:

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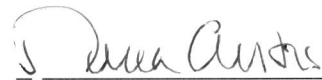
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